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No. 73-396

In the Supreme Court of the United States

OCTOBER TERM, 1973

WALLACE REED, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

HOOD CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. The question presented in this case is whether the arrangements made between the entrymen-petitioners and a corporation ineligible to acquire land under the Desert Land Act [1] by which entries under the Act were made in the names of the petitioners, but all control of the project was vested in the ineligible corpora-

[1] 19 Stat. 377, as amended, 43 U.S.C. 321, *et seq.*

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tion, with secret agreements by which petitioners undertook to transfer title to the corporation after the issuance of patents, justified the Secretary of the Interior in cancelling the entries administratively and seeking judicial cancellation of the patents issued to the petitioners.

In 1960, Wallace Reed and Raymond T. Michener, along with 10 friends and relatives whom they had recruited, filed 12 entries for the acquisition of public land under the Desert Land Act covering about 3,700 acres of public land in Idaho (Pet. App. 137–138)[2]. The Desert Land Act, enacted in 1877 with significant amendments in 1891 and 1908 (see note 5, *infra*), seeks to facilitate reclamation of arid and semi-arid public lands in the West through individual effort. Accordingly, the Act (1) limits entry to individuals and limits each individual to 320 acres, 43 U.S.C. 321; (2) requires that the individual or his (lawful) assigns make certain minimum expenditures in reclaiming the land and file various progress reports, 43 U.S.C. 328; and (3) specifically bars assignments of entries to or for the benefit of any association or corporation, 43 U.S.C. 324.

Pending final proofs on seven of the 12 entries at issue here, the Secretary of the Interior, upon the advice of the Department's Solicitor, reopened an inquiry that had approved the entries to see whether the seven en-

[2] Petitioner has filed an appendix bound with the petition that contains the text of various statutes and regulations and a separately bound appendix containing the decisions below—"Pet. App." references are to the latter.

tries and five patents that had already been issued were based on fraud and misrepresentation and should be cancelled. In a detailed opinion the Secretary determined that they were. *United States* v. *Ollie Mae Shearman,* 73 I.D. 391 (Pet. App. 18). Briefly, the Secretary's investigation revealed that by a complicated series of paper transaction, including mortgages, non-recourse notes and long-term leases, Hoodco Farms, Inc.—a corporation—had acquired complete dominion over the entries, had received the right to all profits in exchange for nominal rent, and had secretly arranged to purchase the patents at a minimal price as soon as they would be issued. In effect, the entrymen had abandoned any good faith intention to reclaim for their own benefit and had agreed to act as strawmen for a corporation ineligible to acquire public land under the Act.

The Secretary specifically found that prior to the dates their entries were allowed each of the entrymen and patentees had assigned his entries to Hoodco Farms, Inc., that prior to the issuance of the patents Hoodco had assignments to and control over a total area of 3,688.6 acres (in violation of both the acreage limitation and corporate prohibition of the Act), that the entrymen had not personally expended the funds required by the Act for reclamation, and that the entrymen and patentees had engaged in fraud, deceit, concealment of fact, and misrepresentation of fact in acquiring their entries and patents (Pet. App. 23).

Based upon this determination, the Secretary ordered administrative cancellation of the entries of the seven remaining entrymen and sought judicial

cancellation of the five entries that had gone to patent.[3]

Thereafter, petitioners sued the Secretary to set aside his administrative decision cancelling the entries and patents, and the United States sued to evict the purchaser of the patented land. These actions were consolidated, and the district court set aside the determination of the Secretary that the entries and patents had been unlawfully obtained (Pet. App. 107–131). On appeal, a unanimous panel of the court of appeals reversed (Pet. App. 136–154).[4]

2. The opinion of the court of appeals fully and clearly sets out the facts concerning these transactions, the applicable provisions of the Desert Land Act, and the controlling decisions. We rely essentially on that opinion and add only the following.

a. Congress enacted the Desert Land Act as a subsidy to *individual small farmers* who would undertake to reclaim and farm desert land in tracts not exceeding 320 acres. As the court of appeals noted, "Congress never intended bargain-price desert land to be provided for the benefit of corporations or large

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[3] Before any patents were issued, Hoodco Farms sold its interest in the project to Virginia Agricultural Company, a company organized for that purpose, and after the five patents were issued they were sold by the entrymen to Virginia as previously arranged with Hoodco (Pet. App. 141–143, 155). There was thus no reliance on public records or *bona fides* in the purchaser of the patented land that arguably might estop the government from cancelling these patents. See Pet. App. 151–152.

[4] A petition for rehearing was denied, with the order specifying that no judge of the court of appeals requested a vote on the suggestion for a rehearing *en banc* (Pet. App. 155).

landholders" (Pet. App. 150). If entries and patents such as those obtained in this case were permitted, it would be an open invitation to corporations to obtain large tracts of public land at subsidized prices contrary to provisions of the Act designed specifically to prevent such abuses of the congressional intent.[5]

b. Petitioners' reliance on the Eighth Circuit's 1898 decision in *United States* v. *Mackintosh*, 85 Fed. 333, to posit a conflict among circuits, is misplaced. *Mackintosh* was a suit to cancel a desert patent Mrs. Mackintosh had received, on the ground that she made a false statement upon final proof and on the ground that she fraudulently conspired with the Salina Stock Company to obtain title for the benefit of the company. The court declined to disturb findings by the Secretary that the evidence did not support either charge.

Nowhere did the Eighth Circuit, as petitioners suggest, hold that events happening after the filing of the initial application are irrelevant to the question whether the patent was lawfully issued. Indeed, the

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[5] When the Desert Land Act was first enacted speculators, land companies and cattlemen flagrantly violated it and similar Acts by employing dummy entrymen to acquire title to large areas. Gates, P. W., *History of Public Land Law Development*, pp. 638, *et seq.* (1968); Ganoe, J. T., "The Desert Land Act in Operation, 1877–1891" *XI Agricultural History*, 142, *et seq.*, April 1937. See, also, Hibbard, *A History of the Public Land Policies*, pp. 424–434 (1939). "In fact the Desert Land Act's widespread abuse leads to the belief that it was passed at the behest of large scale operators." Dunham, H. H., *Government Handout, A Study in the Administration of the Public Lands, 1875–1891*, p. 29 (1941). By the General Revision Act of March 3, 1891, 26 Stat. 1096–1097, and the Amendment of 1908, 35 Stat. 52, prohibiting assignments to corporations, Congress sought to eliminate these abuses of the Act.

entire discussion of the evidence in the *Mackintosh* opinion would have been unnecessary if the court had so held. The language petitioners quote from *Mackintosh* (Pet. 15), that there is " 'nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title, when perfected,' " does not support their position. It is part of a larger statement (85 Fed. at 338) which reads:

> There is nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title, when perfected, for the benefit of even a corporation, when the locator pays the purchase money and complies with the requirements of the statute respecting irrigation. In such case, if the patent be issued to her, she could transfer to whom she pleased. As said by Mr. Justice Brewer, in *U.S.* v. *Budd*, 144 U.S. 163, 12 Sup. Ct. 577:
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> > "The act does not in any respect limit the dominion which the purchaser has over the land *after* its purchase from the government, or restrict in the slightest his power of alienation. * * * *If, when the title passes from the government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied*" [emphasis added].

Thus, the court said that the Act did not restrict alienation after the "entry has been perfected" and the locator "complies with the requirements of the statute respecting irrigation" and "no one save the purchaser has any claim upon it" (85 Fed. at 338).

Under petitioners' interpretation of *Mackintosh*, during reclamation entrymen could surrender posses-

sion and control to a corporation and arrange to convey title to the corporation when they receive the patent so long as they avoid actually signing a contract to sell, enforceable under the statute of frauds. This view is not supported by that case or by any decision of this Court (see Pet. App. 150–151) and was properly rejected by the Court below.[6]

c. The court below properly concluded that " 'fraud or gross irregularity' in the original dismissal of the contest on a stipulated record which did not reveal material facts * * *" justified the Secretary's reopening of the administrative case (Pet. App. 152–153). So long as the Secretary, as guardian of the public lands, retains jurisdiction over the land, he possesses the power administratively to correct departmental actions. *West* v. *Standard Oil Company,* 278 U.S. 200, 210; *Knight* v. *United States Land Association,* 142 U.S. 161.

Once title in land has vested in a claimant under the public land laws as the result of the issuance of a patent (*Iron Silver Mining Co.* v. *Campbell,* 135 U.S. 286), the Secretary may not reconsider the matter administratively. Upon discovery of fraud, however, the United States is not precluded from challenging conveyances made in violation of the public land laws. Thus in *Causey* v. *United States,* 240 U.S. 399, this court sustained the right of the United States to vindicate the integrity of the Homestead Law by allow-

[6] It is also significant that *Mackintosh* was decided on the basis of the 1877 Desert Land Act prior to the 1891 and 1908 amendments which were designed to prevent abuses such as those at issue here.

ing judicial cancellation of a patent fraudulently procured by one who had falsely represented that he had not agreed to transfer the land to a third party. The court below, therefore, properly concluded that the Secretary was entitled to secure cancellation of patents which has been procured by fraud and suppression of material facts, especially here where there was no reliance by an innocent party (Pet. App. 154).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973